CERTIFICATE OF SERVICE

I, Cassandra M. de Souza, do hereby certify that I caused a copy of the foregoing Reply Comments of AT&T Corp. in Opposition to BellSouth's Second Section 271 Application for Louisiana to be served this 28th day of August, 1998, by First Class mail on all parties on the attached service list.

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

PROPOSED FINDINGS

OF

ADMINISTRATIVE LAW JUDGE ELEANOR STEIN

TABLE OF CONTENTS

TABLE OF CONTENTS

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-C-0690 - Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements.

APPEARANCES: See Appendix A.

ELEANOR STEIN, Administrative Law Judge:

BACKGROUND

The Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers to provide

> nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.[1]

In its October 14, 1997 decision, the United States Court of Appeals for the Eighth Circuit determined that, although this section could not be read by the Federal Communications Commission (FCC) to require incumbent local exchange carriers (LECs) to retain and supply existing combinations of elements, "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them."[2]

The Bell Atlantic-New York Pre-filing

On April 6, 1998 Bell Atlantic-New York detailed additional commitments in connection with its application to provide in-region long distance service pursuant to the §271 of

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[1] 47 U.S.C. §251(c)(3).

[2] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

the Act.[1] The Pre-filing contains numerous milestones Bell Atlantic-New York undertook to comply with the requirements for §271 entry, and describes significant steps to further open the New York market to competition. With respect to the combination of network elements, in the Pre-filing Bell Atlantic-New York pledged that competitive LECs

> will have the ability to recombine elements themselves through the use of smaller collocation cages, shared collocation cages, and through virtual collocation. In addition, Bell Atlantic-New York will demonstrate to the Public Service Commission that competing carriers will have reasonable and non-discriminatory access to unbundled elements in a manner that provides competing characters with the practical and legal ability to combine unbundled elements. Among the issues to be discussed in Bell Atlantic-New York's demonstration is the feasibility of 'non-cage collocation'. Bell Atlantic-New York will continue its current, ubiquitous offering of the platform until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers.

In order to define the method or methods by which competing carriers will combine elements, the Commission instituted this proceeding.

The Instituting Order

By order issued May 6, 1998, the Commission directed Bell Atlantic-New York to file with the Commission a proposal describing the method or methods by which competitors could combine network elements and to illustrate how those methods meet Bell Atlantic-New York obligations under the Act and the Pre-filing, providing an opportunity for parties to comment and

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[1] Case 97-C-0271, Pre-filing Statement of Bell Atlantic-New York, filed April 6, 1998 (the Pre-filing), p. 10.

propose alternative methods for combining elements.[1] A May 14, 1998 ruling established a schedule for this proceeding and required that all proposals for a method of combining elements be fully developed, with sufficient explanation to allow parties and Department of Public Service Staff (Staff) to test the proposals. Parties were instructed to include statements as to why the proposed option met the criteria in §§251, 252, and 271 of the Act; an explanation of how the method would operate; examples of other jurisdictions, companies, or industries where the method is working; an explanation of how the proposed method could be implemented in a commercially reasonable time period; documentation of the cost of the method; and an analysis of the impact of adoption of the method upon end-use customer service. Subsequently, the parties were requested to demonstrate how the proposed option was susceptible to making the transition to a facilities-based competitive market strategy. Finally, in the schedule was included a period for collaborative working sessions, prior to presentation of these recommendations to the Commission.

Parties' Filings

This inquiry opened with Bell Atlantic-New York filing offerings of its proposed options for provision of network elements in such a way as to allow carriers to combine them. Other parties then filed comments and alternatives, some with expansive legal and policy discussion, others with a more

[1] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

technical bent.[1] From the filings, six distinct options were distilled, which were named and numbered to serve as the organizing principle for the mass of technical, financial, and policy data provided by the parties. From June 29, 1998 through July 1, 1998, an on-the-record technical conference was held, during which an advisory Staff team led a thorough examination of the offered proposals.[2] At the technical conference, parties presented six exhibits, and a transcript of 784 pages was compiled. Parties presented expert witnesses both to sponsor parties' own options, and to critique or support options sponsored by other parties. The six options are analyzed in some detail below. Following the technical conference, parties filed post-trial type memoranda.[3] Members of the advisory Staff team also met with vendors of various technologies and examined installations of offered options.

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[1] Parties filing comments, and in some cases proposing options, were: United States Department of Defense and all Federal Executive Agencies (DOD); Covad Communications Company (Covad); Metropolitan Telecommunications (Metropolitan); Cablevision Lightpath (Cablevision), NextLink New York, L.L.C. (Nextlink) and Association for Local Telecommunications Services (ALTS); AT&T Communications of New York, Inc. (AT&T); Time Warner Communications Holdings, Inc. (Time Warner); North American Telecom (North American); Hyperion Telecommunications, Inc. (Hyperion), LCI International Telecom Corp. (LCI); Sprint Communications Company, L.P. (Sprint); WorldCom Inc. (WorldCom); Telecommunications Resellers Association (TRA); USN Communications, Inc. (USN); MCI Telecommunications Corporation (MCI); Teleport Communications Group (TCG); Competitive Telecommunications Association (CompTel); Intermedia Communications, Inc. (Intermedia); RCN Telecom Services of New York, Inc. (RCN); and e.spire Communications, Inc. (e.spire).

[2] The advisory Staff team, coordinated by Andrew Klein and Margaret Rubino, included Scott Bohler, Christian Bonvin, Jonathan Crandell, Donna DeVito, Stacey Harwood, Jeffrey Hoagg, Kevin Higgins, Greg Pattenaude, and Steven Sokal.

[3] Filing post-technical conference briefs were Worldcom; Teleport; RCN and USN Communications; AT&T; Bell Atlantic-New York; CompTel; MCI; e.spire; Time Warner; COVAD, LCI; Intermedia; Cablevision; and Sprint.

On May 27, 1998, Bell Atlantic-New York filed its Methods for Competitive LEC Combinations of Unbundled Network Elements (Bell Atlantic filing). In its filing, Bell Atlantic-New York asserted that the Act requires it to do no more than provide competitive LECs collocation as a means to obtain access to unbundled network elements. It offered what it termed "a variety of ways" to combine unbundled network elements which, in its view, went far beyond the legal requirement. First, Bell Atlantic-New York asserts, it voluntarily offered competitors pre-assembled combinations of elements, including the switch sub-platform and the enhanced extended loop. Second, Bell Atlantic-New York offered both physical and virtual collocation to access and combine the complete range of unbundled network elements, asserting it has increased the availability and lowered the cost of physical collocation with smaller cages and shared cages. Third, it offered competitive LECs the ability to combine voice grade unbundled elements in assembly rooms, in assembly points outside the central office, and in common collocation space.[1]

On June 23, 1998, Bell Atlantic-New York filed a supplemental document including service descriptions for its assembly room and assembly point offerings, and detailing the common space physical collocation, renamed Secured Collocation Open Physical Environment (SCOPE). The supplemental filing also included representative rates with preliminary cost support, to establish the relative cost to competitive LECs of combining elements using the various options, prior to the Bell Atlantic-New York filing of tariff rates with cost support by July 23, 1998. This filing responded to the request of parties, and my

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[1] In light of the expedited schedule for this proceeding, preliminary information concerning costs was necessary to address the statutory requirement of just, reasonable, and non-discriminatory rates. However, Bell Atlantic-New York's concern that this not become a rate case is a valid one. The rates at issue here are or will be under scrutiny in the network element proceeding (Case 95-C-0657) and pursuant to Bell Atlantic-New York's July 23, 1998 tariff filing.

express concern, that without at least preliminary cost information, the competitors had insufficient information upon which to base market choices. Where appropriate, Bell Atlantic-New York offers cost estimates based upon those filed in Phase 3 of the network element proceeding.

Two other parties offered proposals. COVAD proposed an identified space collocation option, calling for competitive LEC equipment to be placed alongside the incumbent's frames, as in a virtual collocation arrangement. Unlike virtual collocation, however, COVAD envisions the competitor installing and maintaining its equipment, employing some range of security measures to protect the incumbent's equipment.

Finally, AT&T proposed recent change capability, a software-based option in a preliminary stage of development, allowing competitors to connect disabled loops and ports to existing Bell Atlantic-New York customers without manual disconnects and reconnects.

OVERVIEW

Proposed Methods

The methods proposed by Bell Atlantic-New York share an underlying design, represented in that company's Exhibit 1 (Appendix B). They are all manual methods, and require a Bell Atlantic-New York technician to make a manual cross connection using jumper cable from Point A to Point F; run tie cables from F to G and from E to D; competitor personnel or their surrogates make the cross connection from G to E.[1] In contrast, providing service to an existing Bell Atlantic-New York customer requires

[1] RCN's Brief, p. 3; WorldCom's Brief, p. 3.

connection of A to B.[1] Within this structure, Bell Atlantic-New York offers to make available a variety of mechanisms to realize these connections; competitors expressed interest in utilizing specific mechanisms, depending upon their own facilities and market entry plans; they also requested certain modifications. In addition, some competitors consider all the manual proposals technologically retrograde, unnecessarily expensive, and discriminatory, inasmuch as Bell Atlantic-New York makes a single cross connection on the MDF to connect a link and a port for its own customer.[2]

Generally, competitors criticize Bell Atlantic-New York's proposals for the dependence upon manual connections, with their potential for introducing human error;[3] many competitors see these proposals as a technological step backwards and discriminatory, in that Bell Atlantic-New York may connect its customers using digital methods. Bell Atlantic-New York indicates a generally lower installation trouble rate and shorter mean time to repair for competitors' lines than for its own retail installations. However, although failure rates are low,

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[1] Customers served by digital loops--now 7% but a growing proportion--are combined or multiplexed onto a digital carrier, typically Integrated Digital Loop Carrier (IDLC), and transmitted to a central office. These loops are not individually separated and cross connected at the Main Distribution Frame (MDF), but go through a digital cross connection directly into the switch. To employ any of the incumbent's methods may require replacing the digital loop with copper to allow a manual connection.

[2] WorldCom's Brief, p. 6.

[3] A Bell Atlantic-New York technician demonstrated a manual cross connect during the technical conference, using the gun-style tool used by the company's frame technicians (Tr. 310-312). In fact, the tool failed to complete the connection correctly on the first attempt; the failure was immediately identified and remedied. Parties are polarized as to the efficacy and error rates of these manual functions, some competitors asserting all manual connections are opportunities for failure, the incumbent asserting its tools and methods are essentially error-free.

it is difficult to draw a meaningful conclusion, because in absolute numbers the competitor lines represent a tiny proportion of Bell Atlantic-New York's loops: roughly one tenth of one percent.[1]

A second common concern of competitors is the potential for exhaustion of collocation space, both building space and MDF space. Of concern was Bell Atlantic-New York's inability to respond to questions concerning availability of space or the need for MDF expansion.[2] Moreover, facilities-based competitors that employ collocation for their own networks express concern that finite space resources will be used unnecessarily for competitor element combination purposes. Finally, perhaps of greatest import, competitors stressed the limitations to Bell Atlantic-New York's capacity to fill collocation orders. According to Bell Atlantic-New York, the interval for provision of physical collocation is 76 business days; for virtual collocation, 105 business days. According to the Pre-filing, at current capacity Bell Atlantic-New York can provision 15 to 20 new collocation arrangements monthly.[3] Although Bell Atlantic-New York charges that lack of competitor forecasting constrains its collocation scheduling, it only offers to attempt to smooth demand through negotiations with competitors: a proposal read by competitors as signalling longer intervals.[4]

Nor do the modified collocation proposals offer significant time savings. The various collocation proposals all require approximately the same intervals. Further, Bell Atlantic-New York's witness testified it could take from six to 18 months to augment an MDF if additional space were needed;[5] and

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[1] Bell Atlantic-New York Response to Data Request 9S.

[2] *See* Bell Atlantic-New York Response to Data Request 15; Tr. 259-260.

[3] Bell Atlantic-New York Pre-filing, p. 23.

[4] TCG's Brief, p. 5.

[5] Tr. 276.

the incumbent could not respond to a data request concerning any existing surveys of available MDF space statewide.[1] This collocation pace appears inadequate to meet mass market demand.[2] Bell Atlantic-New York claims that it can provision 300 lines a day in each of its 550 central offices, for a total of 41 million lines per year. However, this claim was illustrative of a theoretical maximum, rather than actual current capacity.[3] The incumbent's calculations of demand are premised upon current demand for cross connects and MDF space in central offices, rather than what is likely to be the demand in a genuinely competitive market, in which customers not only move to competitors and back to the incumbent, but between competitors.

Proposed General Findings

The ultimate issue in this proceeding is whether any, or some combination of, the options offered by Bell Atlantic-New York and other parties comply with the incumbent's §251(c)(3) duty to provide unbundled network elements in a manner that allows requesting competitive carriers to combine them in order to provide telecommunications service. This incumbent local exchange carrier obligation implies, at its core, that competitors have a method to combine elements that, while it need

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[1] Tr. 259; Bell Atlantic-New York Response to Data Request 15.

[2] An end-user party, DOD, for example, urges the Commission to give competing carriers the maximum flexibility to offer services in competition with Bell Atlantic-New York, and to increase the opportunities for competitors to provide innovative services. As an end-user, it attests that the development of competition has been slow outside of regions with a high concentration of business subscribers. DOD explains its need for reliability, redundancy, service quality and technical innovation. DOD urges the Commission to require Bell Atlantic-New York to demonstrate that competitors will be able to use elements efficiently and combine them in any technically reasonable configuration, holding the incumbent to the burden of proving that competitors can efficiently combine elements.

[3] Tr. 119; Bell Atlantic-New York Response to Data Request 11.

not be perfect, is commercially reasonable and nondiscriminatory with respect to ubiquity, cost, timely provision, service quality, and reliability. To its credit Bell Atlantic-New York has developed smaller-cage, shared, and collocation assembly options in accord with the Pre-filing. Several competitors have taken advantage of or indicated interest in these offers.

However, without reaching the issue of whether collocation, in the abstract, as a matter of law constitutes a nondiscriminatory form of obtaining and combining elements, as a matter of fact on this record and under these conditions, none of the methods or combinations of methods offered by Bell Atlantic-New York can be said to meet this test. The lack of a demonstrable software method or its equivalent means that a mass market entry competitor is unlikely to be able to obtain and combine loops and ports ubiquitously on a mass scale. At this time, the availability of network elements on the terms and conditions contained in the Pre-filing serves this purpose. This record indicates unequivocally that Bell Atlantic-New York's options alone, absent provision of the platform (or another electronic or otherwise seamless and ubiquitous method), are unacceptable to support combination of elements to serve residential and business customers on any scale that could be considered mass market entry. Given this record, at this time, absent the provision of the element platform pursuant to the Pre-filing, Bell Atlantic-New York would be in compliance neither with §251(c)(3) nor, consequently, §271(c)(2)(B)(ii).

With the Pre-filing in place, however, and assuming Commission resolution of the enhanced extended link issues, Bell Atlantic-New York's options provide adequate opportunity for market entrants to serve residential and business customers, including business customers in the New York City central offices in which at least two collocation cages are housed.

Based on the parties' filings, comments upon options, evidence adduced at and following the technical conference, post-conference briefs, the advisory Staff investigation, and review of the records in related pending Commission proceedings, my

overall recommendation is that the Commission approve a group or menu of options to be provided by Bell Atlantic-New York to offer unbundled network elements to its competitors so as to allow the requesting carriers to combine these elements to provide telecommunications service. To comply with the Act, this menu must include either the Pre-filing terms and conditions, or some comparably effective electronic or otherwise ubiquitous and timely interface for network element provisioning and combination.

THE LEGAL ISSUES

The Legal Obligations of the Incumbent

Bell Atlantic-New York asserts that its offerings exceed the requirements of the Act. In its view, its voluntary agreement to provide competitive LECs with certain combinations of elements, and its alternatives to traditional collocation, meet its obligation under §251(c)(3) of the Act. Because its Pre-filing offers certain combinations of network elements--the switch sub-platform and enhanced extended loop--Bell Atlantic-New York asserts it has reduced the competitive LECs' need to combine elements themselves to the combination of loop and port. Further, it asserts that its assembly room and assembly point offerings alleviate the need for central office conditioning, providing a more available and less expensive method to combine voice grade loops and ports.

AT&T asserts that Bell Atlantic-New York must demonstrate that competitive LECs can access unbundled network elements and combine them in accordance with §§251 and 252, in order to satisfy the requirements of §271(c)(2)(B)(ii). It asserts that Bell Atlantic-New York's options, which it characterizes as variations on the theme of manual attachment of jumper wires and mandatory collocation, are inadequate and discriminatory under §251 and the Eighth Circuit decision. AT&T asserts its software combination proposals satisfy the Act, and provide the sole basis for non-discriminatory and pro-competitive market entry.

Parsing §251(c)(3), AT&T asserts that the incumbent must first abide by the terms and conditions of its interconnection agreements, negotiated in good faith, arbitrated by state commissions, and approved by those commissions subject to federal judicial appeal.[1] AT&T therefore takes issue with Bell Atlantic-New York's statement of its legal obligations: that its voluntary agreement under the Pre-filing to provide competitive LECs with certain combinations and access to unbundled elements through methods other than collocation are beyond what is required by the Act, and therefore it meets its §251(c)(3) obligations with its voluntary Pre-filing. AT&T argues that no voluntary offer by Bell Atlantic-New York comports with the Act requirements. In addition, it asserts Bell Atlantic-New York's formulation deprives competitive LECs of their rights to good faith negotiation, arbitration, litigation over the approval of agreements and federal judicial appeal.

At present, this issue is under consideration by the Commission in the context of a petition for declaratory and other relief by AT&T and others.[2] The respective rights and obligations of the parties under tariff and interconnection agreements are the subject of negotiations and other proceedings as well. However, without reaching this legal issue here, as a matter of fact the recommended finding is that upon review of these offered options, the Pre-filing terms and conditions concerning provision of combined elements are a necessary component of Bell Atlantic-New York compliance with §§251(c)(3) and 271.

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[1] 47 U.S.C. §§251(c)(3), 251(c)(1)(3), 252(a)(b), 252(c)(1), and 251(e)(6).

[2] Case 97-C-0271, Application of Bell Atlantic-New York for In-Region InterLATA entry - Joint Motion for Declaratory Judgment and Stay of Proceedings.

The Asserted Requirement of
Physical Separation and Reconnection

Bell Atlantic-New York asserts the Act and the Eighth Circuit decision require a physical separation or unbundling of network elements, and a concomitant physical recombination of these elements by competitors. In its view, AT&T's recent change proposal or, for that matter, any method not entailing physical, manual disconnection of the loop from the port, fails the Eighth Circuit test. It characterizes AT&T's recent change proposal as requiring merely the deactivation and reactivation of the loop, as customers were taken out of service and then restored, as a result of competitive LEC instructions to the incumbent's switch. Bell Atlantic-New York, supported by Time Warner, maintains that the functions carried out by a hypothetical recent change method would not constitute the unbundling of the loop and port by the incumbent and their recombination by the competitor within the meaning of §251(c)(3) of the Act, as interpreted by the Eighth Circuit. In other words, Bell Atlantic-New York rejects logical unbundling on the ground that only a physical disconnection, and physical reconnection of the loop and the port, conform to the Act and Eighth Circuit requirements.

AT&T replies that Bell Atlantic-New York's witnesses referred to the recent change process as disconnection; and that taking the customer out of service by electronic, as opposed to manual, means, complied with the Eighth Circuit requirements.[1]

While ubiquitous, timely recombination, consistent with mass market entry, is essential, that requirement is best fulfilled in New York at this time by the Pre-filing terms and conditions, in conjunction with Bell Atlantic-New York's other

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[1] In MCI's view, by contrast, neither the incumbent nor the AT&T options comply with the Act; MCI urges the Commission to hold that only by providing competitors with MCI's proposed forms of already-combined elements will Bell Atlantic-New York be consistent with §251(c)(3). As this proceeding was narrowly defined to consider options for competitor recombining of elements, MCI's proposals were not admitted at the technical conference.

offerings. The only electronic method under consideration for competitors to combine elements themselves, AT&T's recent change proposal, is insufficiently developed to be adopted at this time. However, further exploration of the development of this option in relation to the incumbent's existing or legacy systems is warranted.

As a threshold matter, the proposed finding is that if an electronic system functionally unbundles and recombines elements, in today's network, that complies with the Act.[1] As the Eighth Circuit held, a competitor need not have facilities of its own in order to obtain access to the incumbent's network elements.

The Standard of Review

While this proceeding was initiated by the Commission as an stand-alone inquiry, its genesis is in parallel proceedings pursuant to state law and §§251, 252, and 271 of the Act.[2] In examining options, criteria were adopted to evaluate compliance with (1) the Act; (2) the policies and precedent of this Commission; (3) current federal judicial case law; and (4) the Bell Atlantic-New York Pre-filing.[3] In order to meet these standards, an option must be universally available, and must be provided pursuant to interconnection agreements, as well as under tariff. In addition, to meet the "nondiscriminatory" requirement of §251(c)(3), there should be, if not identity, rough comparability between the burden Bell Atlantic-New York places upon its own retail operation to combine elements and provide them to customers, and that placed upon competitors to do the same.

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[1] The term "network element" includes "features, functions, and capabilities." See 47 U.S.C. §153(29).

[2] 47 U.S.C. §§251, 252, and 271.

[3] Case 97-C-0271, Pre-filing Statement of Bell Atlantic-New York, filed April 6, 1998 (the Pre-filing).

Components of this comparable burden include whether options are provided on a commercially reasonable, timely basis, and whether they function in such a way as to allow a competitor to obtain and combine network elements on a scale that is consistent with reasonable expectations of competitive volumes. Options were examined for ease of competitive entry, and for compatibility with the eventual development of facilities-based competition in New York. Options were examined as to their impact on the service to end-users, customers of both incumbent and competitor carriers; and their impact on the security and reliability of the network. Finally, options were analyzed for ease of customer migration to a competitor's own facilities, to another competitive LEC, or back to Bell Atlantic-New York.

These criteria were presented to the parties in rulings and at the Technical Conference. Parties were invited to comment on or add criteria; as none did, these are considered accepted as the relevant standards by which to measure the options. Parties ranked, in testimony and in brief, the options presented on a numerical scale from one to 10, in these categories.

The method employed is not based on the assumption that the goal is to recommend one panacea. In light of the diversity of market entry strategy, customer base, financial concerns, and timetable of the players in the New York competitive market, the goal is to present the Commission with a range of options, toward the end of ensuring that Bell Atlantic-New York provides its competitors a menu of choices that, as a totality, complies with these criteria. Indeed, competitors did not agree with each other as to which options were preferable, and evinced diverse strategies and needs. This heterogeneity invites a menu approach to produce a working model for element combination by competitors.

Bell Atlantic-New York's
Enhanced Extended Link Offering

Although the purview of this proceeding was defined narrowly in the instituting order, at the technical conference a